

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

JORGE ERNESTO MADUEÑO,
Petitioner.

No. 2 CA-CR 2015-0160-PR
Filed August 10, 2015

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

NOT FOR PUBLICATION

See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

Petition for Review from the Superior Court in Pinal County

No. S1100CR200401846

The Honorable Joseph R. Georgini, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

M. Lando Voyles, Pinal County Attorney
By Renee J. Waters, Deputy County Attorney, Florence
Counsel for Respondent

Jorge E. Madueño, Florence
In Propria Persona

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MEMORANDUM DECISION

Presiding Judge Miller authored the decision of the Court, in which Chief Judge Eckerstrom and Judge Espinosa concurred.

M I L L E R, Presiding Judge:

¶1 Pursuant to Rule 32.9(c), Jorge Madueño seeks review of the trial court's order denying his motion seeking to set aside his sentence. For the reasons that follow, we grant review but deny relief.

¶2 Madueño pled guilty to second-degree murder and was sentenced in June 2006 to a thirteen-year prison term with 167 days of presentence incarceration credit. He filed a notice of post-conviction relief, but did not file a pro se petition after his counsel filed a notice stating she could find no colorable claims to raise in a post-conviction proceeding.

¶3 In 2012, Madueño again sought post-conviction relief, claiming, inter alia, that he was entitled to additional presentence incarceration credit. The trial court summarily denied relief, and we denied relief following Madueño's petition for review. *State v. Madueño*, No. 2 CA-CR 2012-0391-PR (memorandum decision filed Dec. 27, 2012). We observed that his claim regarding presentence incarceration credit was precluded because it could have been raised in his first Rule 32 proceeding, citing Ariz. R. Crim. P. 32.2(a)(3).

¶4 In May 2014, Madueño filed a "motion to correct time credit," citing Rule 24.4, Ariz. R. Crim. P., and again asserting he is entitled to additional presentence incarceration credit. He claimed he had been arrested for his offense in December 2004 and sentenced in June 2006 and the presentence report thus incorrectly stated he was entitled to only 167 days of presentence incarceration credit. The trial court summarily denied that motion, which it treated as another petition for post-conviction relief. Madueño did not seek review of that ruling.

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¶5 In August 2014, he sought to “set aside” his sentence, again citing Rule 24.4 and repeating his presentence incarceration credit claim. The trial court denied the motion, stating the issue raised “lacks sufficient basis in law and fact to warrant further proceedings herein and no useful purpose would be served by further proceedings.” This petition for review followed the court’s denial of Madueño’s motion for reconsideration.

¶6 On review, Madueño repeats his claim and asserts he is entitled to raise it at any time pursuant to Rule 24.4 to correct what he characterizes as “an oversight or . . . plain omission [in] the presentencing report” that served as the basis for the trial court’s calculation of his presentence incarceration credit. But Rule 32.9(c) does not permit us to review the denial of a motion filed pursuant to Rule 24.4;¹ it instead permits review only of “the final decision of the trial court on the petition for post-conviction relief or the motion for rehearing” filed pursuant to Rule 32.9(a).

¶7 Although the trial court did not expressly treat Madueño’s filing as a petition for post-conviction relief pursuant to Rule 32.3, it recited language consistent with Rule 32.6(c), permitting the summary disposition of Rule 32 claims. Assuming the court thus intended to treat Madueño’s filing as a Rule 32 petition, it did not abuse its discretion in summarily denying it. See *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007) (denial of petition for post-conviction relief reviewed for abuse of discretion). A claim of sentencing error cannot be raised in an untimely post-conviction proceeding. Ariz. R. Crim. P. 32.1(c), 32.4(a); see also *State v. Shrum*, 220 Ariz. 115, ¶¶ 6-7, 23, 203 P.3d 1175, 1177, 1180 (2009) (holding

¹ The denial of a Rule 24.4 motion that “affect[ed] the substantial rights of the party” would be subject to appeal pursuant to A.R.S. § 13-4033(A)(3). Even if we assumed the court’s order here was appealable pursuant to that subsection and if we construed Madueño’s petition for review as a notice of appeal, we nonetheless would lack jurisdiction to consider the ruling because his petition was filed more than twenty days after the court’s ruling. Ariz. R. Crim. P. 31.3; *State v. Limon*, 229 Ariz. 22, ¶¶ 3-4, 270 P.3d 849, 850 (App. 2011).

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illegal sentence claim precluded); *Swoopes*, 216 Ariz. 390, ¶ 42, 166 P.3d at 958 (fundamental error not excepted from preclusion).

¶8 Although we grant review, we deny relief.